Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-136

WHOLESALE MATERIALS COMPANY, INC.,
Petitioner,

versus

MAGNA CORPORATION d/b/a MISSISSIPPI STEEL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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IN THE
SUPREME COURT OF THE UNITED STATES
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No.

WHOLESALE MATERIALS COMPANY, INC.,
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MAGNA CORPORATION d/b/a MISSISSIPPI STEEL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

The Petitioner, Wholesale Materials Company, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Mississippi entered in this proceeding on March 29, 1978.

OPINIONS BELOW

The opinion of the Supreme Court of Mississippi, reported at 357 So.2d 296, appears in Appendix "A". The opinion of the Circuit Court of Forrest County,

Mississippi appears in Appendix "B". The judgment of the Supreme Court of Mississippi appears in Appendix "C". The judgment of the Circuit Court of Forrest County, Mississippi appears in Appendix "D". The Order of the Supreme Court of Mississippi denying petition for rehearing appears in Appendix "E".

JURISDICTION

The judgment of the Supreme Court of the State of Mississippi was entered on March 29, 1978. A timely petition for rehearing was denied on April 26, 1978, and this petition for certiorari was filed within 90 days of the latter date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether the State of Mississippi can unilaterally alter a nationally accepted presumption arising from use of the United States mail without impairing interstate commerce in violation of *U.S. CONST.* art. I, §8, cl. 3.

STATUTORY PROVISIONS INVOLVED

U.S. CONST., art. I, §8, cl. 3.

> The Congress shall have power
>
> . . . .
>
> 3. To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

STATEMENT OF THE CASE

On February 10, 1975, Magna Corporation d/b/a Mississippi Steel ("Magna") sued Wholesale Materials Company, Inc., ("Wholesale Materials") in the Circuit Court of Forrest County, Mississippi, claiming a $59,668.95 past due balance on an open account for the purchase of construction steel.

Wholesale Materials defended by setting up an oral contract showing that the steel was to have been purchased at a lower, fixed price. To remove the oral agreement from the U.C.C. statute of frauds, Wholesale Materials offered into evidence a copy of its memorandum to Magna confirming the terms and details of the contract (R2-178). This letter is fully recited in the opinion of the Mississippi Supreme Court (Appendix "A").

Although Wholesale Materials proved without rebuttal that this letter was properly addressed and duly posted into the mails through its regular office system (R1-173), the trial court excluded the letter on the supposition that the proper posting of United States mail raises no presumption that is "received" as contemplated by the U.C.C. Since Wholesale Materials was denied the presumption that its confirmatory letter was received, the oral contract was held unenforceable resulting in a judgment against Wholesale Materials for $69,799.47 principal and interest (Appendix "D").

The adverse effects of this ruling on commerce were pointed out to the trial court on motion j.n.o.v. The

issue was then raised on appeal to the Mississippi Supreme Court and again on petition for rehearing.

Notwithstanding the effect of the presumption's denial on accepted commercial practice, the Mississippi Supreme Court affirmed, holding that the proper posting of United States mail raises no presumption that the mail is received.

REASON FOR GRANTING THE WRIT

The Decision Of The Mississippi Supreme Court Conflicts With The Decisions Of This Court, The Courts Of Appeals, And The Highest Court Of Every Other State In An Area Where A National Standard Is Necessary To Avoid Intolerable Burdens On Interstate Commerce.

The statute of frauds section of the U.C.C. states a general rule that contracts for the sale of goods valued at $500.00 or more are unenforceable unless written.[1] There is an exception to this rule, however, whereby

1 U.C.C. §2-201(1) [*MISS. CODE ANN.* §75-2-201(1) (1972)] provides as follows:

> Formal requirements; statute of frauds.
>
> (1) Except as otherwise provided in this section, a contract for the sale of goods for the price of five hundred dollars ($500.00) or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

unwritten contracts between merchants are nonetheless enforceable provided a "writing in confirmation of the contract . . . is received" by the other contracting party.[2]

The Mississippi Supreme Court rightly interpreted this exception to require that the written confirmation of an unwritten contract be "received" by the intended party.[3] In so holding, however, the Mississippi Court erroneously ruled that absolute proof of receipt is also required before such a writing sent through the mail becomes admissible.

The effect of the Court's decision is to affirm the trial court's ruling that the mailing of properly addressed correspondence raises no presumption of receipt.

The Mississippi Supreme Court failed to cite a single case or other authority in support of this proposition. The Court merely stated that "it is imperative that the writing in confirmation of the oral contract be received" (Appendix "A").

This Court, however, has ruled on the issue in numerous cases, the most frequently cited opinion being that in *Hagner v. United States*[4]:

2 *Id.* §2-201(2) [*MISS. CODE ANN.* §75-2-201(2) (1972)]:

> (2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten (10) days after it is received.

3 Appendix "A"; 357 So.2d at 298.

4 285 U.S. 427 (1931).

> The rule is well settled that proof that a letter properly directed was placed in a post office creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed.[5]

And the Courts of Appeals have unanimously followed the *Hagner* decision in settling the federal common law on the issue.[6] More importantly, however, the Mississippi decision conflicts with the decisions of every other state having ruled on the question in the last 40 years. In all, 38 states plus the District of Columbia have passed on this issue and all have held that proof of mailing is presumptive of receipt.[7]

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5 285 U.S. at 430, *citing* Rosenthal v. Walker, 111 U.S. 185 (1883); *See also* Grannis v. Ordean, 234 U.S. 385 (1914); Atherton v. Atherton, 181 U.S. 155 (1900); Schutz v. Jordan, 141 U.S. 213 (1890); Henderson v. Carbondale Coal & Coke Co., 140 U.S. 25 (1890).

6 *See* Legille v. Dann, 544 F.2d 1 (D.C. Cir. 1976); United States v. Long, 505 F.2d 512 (9th Cir. 1974); In re Nimz Transp. Inc., 505 F.2d 177 (7th Cir. 1974); United States v. Belgrave, 484 F.2d 915 (3d Cir. 1973); United States v. Bethea, 483 F.2d 1024 (4th Cir. 1973); United States v. Perry, 474 F.2d 983 (10th Cir. 1973); United States v. Lee, 458 F.2d 32 (9th Cir. 1972); United States v. DeNarvaez, 407 F.2d 185 (2d Cir. 1969); Federal Ins. Co. v. Summers, 403 F.2d 971 (1st Cir. 1968); Charlson Realty Co. v. United States, 384 F.2d 434 (Ct. Cl. 1967); Lyle Cashion Co. v. McKendrick, 204 F.2d 609 (5th Cir. 1953).

7 *See* In re Nimz Transp. Inc., 505 F.2d 177 (7th Cir. 1974); Simpson v. Jefferson Std. Life Ins. Co., 465 F.2d 1320 (6th Cir. 1972); Elmore v. United States, 465 F.2d 1232 (4th Cir. 1972); Hegler v. Bd. of Educ., 447 F.2d 1078 (8th Cir. 1971); Richardson v. Brown, 443 F.2d 926 (10th Cir. 1971); Federal Ins. Co. v. Summers, 403 F.2d 971 (1st Cir. 1968); Tish Family Foundation, Inc. v. Texas Nat. Petroleum Co., 326 F. Supp. 1128 (D. D.C. 1971); Senerchia v. United States, 154 F. Supp. 678 (D.R.I. 1957); Seven Provinces Ins. Co. v. Commerce & Indus. Ins. Co., 65 F.R.D. 674 (W.D. Mo. 1975); O'Daniel v. Michigan Mut. Liab. Co., 88 F. Supp. 339 (W.D. Ky. 1950); Harrell v. Alabama Farm Bureau Ins. Co., 251 So.2d 220 (Ala. 1971); Thompson v. Mecey, 416 P.2d 553 (Ariz. 1966); Goodson v. Bogarts, Inc., 252 C.A. 2d 32 (Calif. 1967); Canyon Crest Villas South v. Bd. of County Comm'rs., 542 P.2d 395 (Colo. 1975); State ex rel. Hall v. Cooper, 347 A.2d 137 (Del. 1975); Brown v. Griffen Indus., 281 So.2d 897 (Fla. 1973); Interstate Life & Accid. Ins. Co. v. Merritt, 207 S.E. 2d 231 (Ga. 1974); Hobson v. Sec. State Bank, 57 P.2d 685 (Idaho 1936); Lynn v. Village of West City, 345 N.E. 2d 172 (Ill. 1976); Reserve Ins. Co. v. Johnson, 150 N.W. 2d 632 (Iowa 1967); Marcotte's Est. v. Clay, 224 P.2d 998 (Kan. 1962); Moore v. Drexel Homes, Inc., 293 So.2d 500 (La. 1974); Border v. Grooms, 297 A.2d 81 (Md. 1972); Good v. Detroit Auto Inter-Ins. Exch., 241 N.W. 2d 71 (Mich. 1976); Nafstad v. Merchant, 228 N.W. 2d 548 (Minn. 1975); Zurheide-Hermann, Inc. v. London Square Dev. Co., 505 S.W. 2d 161 (Mo. 1973); James Talcott, Inc. v. Reynolds, 529 P.2d 352 (Mont. 1974); Johnson & Dealaman, Inc. v. Wm. F. Hegarty, Inc., 224 A.2d 510 (N.J. 1966); Woodsville Fire Dept. v. Cray, 187 A. 478 (N.H. 1936); Adams v. Totsch, 362 P.2d 984 (N.M. 1966); A. & B. Service Station, Inc. v. State, 376 N.Y.S. 2d 656 (N.Y. 1975); Willis v. J. M. Davis Indus., Inc., 186 S.E. 2d 913 (N.C. 1972); Young v. Bd. of Review, 222 N.E. 2d 789 (Ohio 1967); State Farm Auto Ins. Co. v. Farmers Ins. Exch., 393 P.2d 768 (Or. 1964); Burkowitz v. Mayflower Sec., Inc., 317 A.2d 584 (Pa. 1974); Calder v. Comm. Cas. Inc. Co., 188 S.E. 864 (S.C. 1937); Investors Acceptance Co. v. James Talcott, Inc., 454 S.W. 2d 130 (Tenn. 1967); Cooper v. Hall, 489 S.W. 2d 409 (Tex. 1972); Sexton v. Neun, 306 A.2d 113 (Vt. 1973); Automat Co. v. Yakima County, 497 P.2d 617 (Wash. 1972); Nat. Grange Mut. Ins. Co. v. Wyoming County Ins. Agency, 195 S.E. 2d 151 (W. Va. 1973); Frank v. Metro Life Ins. Co., 277 N.W. 643 (Wis. 1938).

Yet the Mississippi Supreme Court's decision is not disturbing simply because it puts Mississippi at odds with the rest of the country on an evidentiary presumption. The importance of the decision lies, rather, in its adverse impact on an intrastate and interstate commercial system heavily reliant on assurances that material sent through the United States Mail will be received.[8]

---

8 The primary impetus to the Postal Reorganization Act, 39 U.S.C. §§1 *et seq.* (1970), and the Postal Reorganization Act Amendments of 1976, 39 U.S.C. §§101 *et seq.* (1976), was the unreliability of the old postal system and the concern this caused the nation's businesses. The history of this legislation indicates strong Congressional recognition of the dependency of businessmen on a reliable postal system. *See* 1970 *U.S. CODE CONG. & AD. NEWS* 3649, 3652.

In *A & P Tea Co. v. Cottrell*, 424 U.S. 366 (1976), this Court set out a test to be applied when the effect of state regulation touches interstate commerce. Any such regulation, according to this test, must be justified by "legitimate local public interests". If such interests exist, the law will be upheld, but only if "the burden imposed on . . . commerce is not clearly excessive in relation to the putative local benefits".[9] In determining the "local benefits" the Court will look to (1) "the nature of the local interest"; and (2) "whether it could be promoted with a lesser impact on interstate activity."[10]

Since the Mississippi Supreme Court cited no local interest to be promoted by its ruling, it will fall to the Respondent to conjure some local justification for applying the statute of frauds so as to deny a nationally accepted presumption. Whatever reasons there may be for this denial, it is difficult to envision a state interest which could not be promoted with less impact on interstate business activity.

Although it might be argued that this case involves a purely intrastate transaction between Mississippi parties, this Court early on established that intrastate regulation affecting national commerce can be prohibited. *United States v. Women's Sportswear Mfr's Ass'n.*, 336 U.S. 460, 464 (1949):

9 424 U.S. at 371, 372.

10 *Id.*

> . . . the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.

There are few areas of more critical importance to interstate commerce than presumptions relating to the sending and receipt of mail. Surely every personal and business enterprise in the United States is dependent upon the mails in the transaction of commercial activity.[11] If one state, in the face of unanimous federal and state law to the contrary, can deny a presumption that the rest rely upon, the confusion created in the commercial world will be widespread.

The Mississippi Supreme Court may, of course, create or deny presumptions in construing local commercial law. And even if these presumptions incidentally or indirectly affect interstate commerce, this Court has held in numerous cases that no interference results in the constitutional power of Congress to regulate commerce among the states.[12]

But when the effect of a state law threatens, as it does here, to unsettle interstate commercial activity, the

11 1970 *U.S. CODE CONG. & AD. NEWS* 3649.

12 A & P Tea Co. v. Cottrell, 424 U.S. 366 (1976); Ziffrin v. Reeves, 308 U.S. 132 (1939); Ware & Leland v. Mobile County, 209 U.S. 405 (1908).

national interest must prevail.[13] These rules are no less applicable to ostensibly intrastate regulation which, as in the instant case, affects commerce with other states.[14]

CONCLUSION

The decision of the Mississippi Supreme Court unsettles a heretofore nationally uniform presumption arising from use of the mails. And it is hardly questionable that uniformity in this area is essential to the nation's businesses who rely on the postal system and presumptions arising from its use. Whether Mississippi can unilaterally alter these accepted presumptions without disrupting commerce is a question justifying the attention and consideration of this Court.

Respectfully submitted,

L. ARNOLD PYLE

_____

Counsel for Petitioner

July, 1978

13 A & P Tea Co. v. Cottrell, 424 U.S. 366 (1976).

14 United States v. Women's Sportswear Mfr's. Ass'n., 336 U.S. 460 (1949).

CERTIFICATE OF SERVICE

I, L. ARNOLD PYLE, one of the attorneys for Petitioner, Wholesale Materials Company, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of July, 1978, I served a copy of the foregoing Petition for Writ of Certiorari on the required parties by mailing a copy of same by United States mail, first class, postage prepaid, to Honorable B. Sterling Tighe, Tighe and Ross, Attorneys at Law, Suite 925, Depositors Savings (Bankers Trust) Plaza Building, Jackson, Mississippi, 39205, and to Honorable Frank D. Montague, Jr., Gray, Montague, Jackson, and Pittman, Attorneys at Law, Post Office Drawer 1975, Hattiesburg, Mississippi, 39401, attorneys for Respondent.

_____

L. ARNOLD PYLE
Attorney for Wholesale
Materials Company, Inc.

APPENDIX "A"

IN THE SUPREME COURT OF MISSISSIPPI

NO. 50,152

WHOLESALE MATERIALS COMPANY, INC.

versus

MAGNA CORPORATION, D/B/A
MISSISSIPPI STEEL

BEFORE SMITH, ROBERTSON, AND LEE

ROBERTSON, JUSTICE, FOR THE COURT:

On February 10, 1975, Magna Corporation, doing business as Mississippi Steel, filed suit on open account in the Circuit Court of Forrest County against Wholesale Materials Company, Inc., for $59,668.95, the balance due on sales of steel reinforcing rods from July, 1972, to October, 1974.

Wholesale answered and counter-claimed, alleging that it had overpaid Mississippi Steel in the sum of $17,902.05.

After a full trial, the court, sitting as judge and jury, on October 15, 1976, rendered judgment for Mississippi Steel, for $69,799.47, being $59,668.95 principal and $10,130.52 interest.

Wholesale has appealed, assigning as error that the court erred in holding that there was no confirmatory memoranda received by Mississippi Steel, and that the provisions of the Statute of Frauds of the Uniform Commercial Code, [Miss. Code Ann. sec. 75-2-201 (1972)], applied and made unenforceable the alleged oral contract to sell steel reinforcing bars at fixed prices to Wholesale. Section 75-2-201 provides in part:

> "(1) Except as otherwise provided in this section, a contract for the sale of goods for the price of five hundred dollars ($500.00) or more is not enforceable by way of action or defense *unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.* A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.
>
> "(2) Between merchants *if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents,* it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten (10) days after it is received." [Emphasis added].

Appellant contended that about April 19, 1972, J. W. McLaughlin, its president, met with W. J. Califf, Jr.,

vice-president of sales of appellee, at the Sun-n-Sand motel in Jackson, Mississippi, and at that time entered into an oral contract providing that appellee would sell and deliver to appellant about 2,900,000 pounds of steel reinforcing bars at a fixed base price of $5.90 per hundred pounds until December 31, 1972, and at a fixed base price of $6.35 per hundred pounds after January 1, 1973.

McLaughlin testified that he, for the appellant, wrote a letter of confirmation on April 20, 1972, to Mississippi Steel. McLaughlin explained appellant's office procedure:

> "We have a regular system like all other companies would have. We have the secretaries type the letters out, then they bring them in for my signature and they place them into envelopes and mail them out."

That letter reads:

> [Letterhead of WHOLESALE MATERIALS COMPANY]
>
> HATTIESBURG, MISSISSIPPI
> April 20, 1972
>
> Mississippi Steel Corporation
> P. O. Box 5780
> Pearl Branch
> Jackson, Mississippi 39208
>
> Attention: Mr. Bill Califf

Dear Bill:

To confirm your proposal concerning the Empire Louisiana Bridge Project, I am listing below, the essential cost, and profit potential that we agreed to yesterday at the Sun & Sand, for our file.

First, we are paying $5.90 base plus equalized freight of 27 [cents], plus the standard size extras, and will pay this price until December 31, 1972, after January 1, 1973, then the base price could go up to $6.35 plus equalized freight and present size extras but no higher throughout the completion of the job.

After our discussions yesterday at the Sun & Sand we are seriously considering joining you and Mississippi Steel Corporation in this venture, particularly after your agreement to furnish exact cut length bars off the mill on quantities of 40,000 lbs. or more of a size and length. This would cut our fabricating cost tremendously, plus almost eliminate drops and speed up our bending.

I know you want to sell this large tonnage and Wiley as your director would like to favor you with the business with the market the way it is, however, he said to provide him with a breakdown, so that he could be sure that:

(1) We could work with you and furnish this job at a profit to Wholesale

Materials Co., Inc. and

(2) That you and Wholesale Materials Co., Inc. could furnish materials as needed on the job.

These are his only concerns.

With sizes 3 thru 11 being used, you recommend that we use #5 or #6 bar as a price build-up, for average size extra. Now, as you outlined, we are forwarding him our cost as follows:

	To December 31, 1972	After January 1, 1973
Base	$ 5.90	$ 6.35
Equalized Freight	.23	.23
Less Competitive Allowance	(.11)	(.11)
Size Extra	.70	.70
Drops	.10	.10
Freight to Empire	.30	.30
Fabrication & Handling	.60	.60
	$ 7.72	$ 8.17

I agree with you that our total cost should run (with luck) less than $8.00 cwt. This should give Wholesale Materials Co., Inc. a minimum margin of $29,000.00 on the job after final quantities are completed.

The rebars you agree to furnish for this project will be the estimated plan quantities or actual quantities whichever is greater, after approved bar lists have been received.

Very truly yours,

WHOLESALE MATERIALS CO., INC.

/s/ J. W. McLaughlin
J. W. McLaughlin,
President

JWM:yl

No further testimony was adduced as to the actual mailing of this letter.

McLaughlin also testified that he prepared a comprehensive purchase order on July 27, 1972, addressed to Mississippi Steel and embodying the terms of the oral contract, and that a copy of the purchase order was placed in the file of the Empire, Louisiana, project of W. R. Fairchild Construction Company. No testimony was adduced as to the mailing of the purchase order.

Califf testified positively and unequivocally that he never received the letter of April 20, 1972, nor the purchase order of July 27, 1972.

Appellant and appellee had dealt with each other for at least ten years. The usual procedure was for Wholesale to place orders by telephone, and Mississippi Steel would ship out the orders and bill Wholesale at prevailing market prices. This was the procedure followed on the Empire, Louisiana, job.

From July, 1972, until April 2, 1973, orders shipped to Wholesale were billed to it at $5.79 base price per hundred pounds, and from April 3, 1973, until July 17, 1973, shipments of steel reinforcing bars were billed to Wholesale at $5.90 base price per hundred pounds. On billings after July 17, 1973, the base price was $6.35 per hundred pounds.

On September 7, 1973, the prevailing market price went above $6.35 per hundred pounds, and appellee's prices, as reflected in its billings of appellant, went up accordingly. McLaughlin testified that he protested over the phone to Cotton Caldwell, president of Mississippi Steel, and that Caldwell told him that the price of steel had gone up and, in order to stay in business, Mississippi Steel had to raise prices.

Later McLaughlin protested to Califf, and finally asked for a hearing before the Board of Directors of Mississippi Steel. Caldwell turned down McLaughlin's request, on the basis that this was a managerial or administrative decision, to be made by the officers of the corporation, and not by the Board of Directors. Finally when the Empire, Louisiana, job was concluded in October, 1974, and Wholesale refused to pay the balance due according to the appellee's figures, suit was filed on February 10, 1975.

Under Section 75-2-201(2), it is imperative that the writing in confirmation of an oral contract be *received* by the party against whom its terms will be asserted, so that that party will have notice and an opportunity to object if the terms were not as stated in the writing.

Before section 75-2-201 supplemented the old Statute of Frauds as to dealings "between merchants", it was required that:

> "[T]he promise or agreement upon which such action may be brought, or some memorandum or note thereof, shall be in writing, *and signed by the party to be charged therewith or signed by some person by him or her thereunto lawfully authorized in writing.*" Miss. Code Ann. sec. 15-3-1 (1972). (Emphasis added).

Since failure to object in writing within ten days would estop the party to whom the confirmation writing is addressed, it becomes absolutely necessary that such party receive the confirmatory writing. It would be a simple matter for the sender of the confirmatory writing to mail it by Registered Mail — Return Receipt Requested. That was not done in this case, and no proof was adduced that appellee received the letter of April 20, 1972.

We think that the trial court was correct when it found that:

> "11. There were no confirmatory memoranda between the parties under which they made any agreement with respect to sale of reinforcing steel bars or any confirmatory memoranda otherwise setting forth in a writing an intention by the parties as a final expression of any agreement between them.
>
> "12. There was no course of dealing or usage of trade between or with respect to the parties indicating that Defendant had bought from Plaintiff and Plaintiff had sold to Defendant under oral contracts steel reinforcing bars at a *fixed* and *certain* price for periods prior to July 1972.
>
> "13. Plaintiff never received any written purchase order from Defendant with regard to the purchase and sale of steel reinforcing bars in this action and thereby there was no acceptance of any offer by Plaintiff set forth in any

> written purchase order by virtue of the sale, delivery and shipment of reinforcing steel bars by Plaintiff to Defendant."

Not having complied with the requirements of Section 75-2-201(2) to remove the alleged oral contract from the statute of frauds, we find, as did the trial court, that the statute of frauds applied.

The judgment of the lower court is, therefore, affirmed.

AFFIRMED.

PATTERSON, C.J., SMITH, P.J., SUGG, WALKER, BROOM, LEE, BOWLING, AND COFER, JJ., CONCUR.

APPENDIX "B"

IN THE CIRCUIT COURT OF
FORREST COUNTY, MISSISSIPPI

IN VACATION 1976

MAGNA CORPORATION, d/b/a
MISSISSIPPI STEEL
Plaintiff and
Counter-Defendant

versus Cause No. 7676

WHOLESALE MATERIALS COMPANY, INC.
Defendant and
Counter-Claimant

OPINION

The issue in this case is whether or not Defendant's proof at trial removed this case from the coverage and protections of the statute of frauds provisions of the Uniform Commercial Code, Section 75-2-201 (1), (2) or (3) thereof.

After a detailed review of the testimony and evidence adduced during the course of the well-tried case, as well as a careful review of the legal authorities cited by able counsel, the Court is of the opinion that the cited statute of fraud applies, i.e., the defendant failed to meet its burden of proof in support of its counter-claim. The Court, in reaching this conclusion, is mindful of, and recognizes, the penal effect of the statute of frauds and the resulting efforts by courts to place limitations upon its application. As stated by the most able and learned trial jurist in his treatise on Mississippi Law, Judge Grant stated:

> ". . . If an oral contract, otherwise within the statute (for example, a contract for personal service for a longer period than 15 months) has been completely executed or performed, it is taken out of the operation of the statute. This is upon the theory that the statute of frauds was intended to prevent fraud and not to be a cloak for fraud or a means of perpetrating fraud . . . . ." (Grant, Summary of Mississippi Law, Section 1535)

This cited judicial attitude toward enforcement of the statute of frauds was decisive in this Court's denial

of Plaintiff's motion to strike Defendant's affirmative defense of alleged oral contract and Plaintiff's demurrer to Defendant's Counter-Claim, which also alleged oral contract. After all the proof is in, these same statutory rights claimed by Plaintiff, i.e., the statute of frauds, continually and consistently raised and not waived during the course of the trial, must be recognized and protected by this Court. Accordingly, the Plaintiff's motion to exclude the evidence of the defendant and to grant judgment for the Plaintiff is sustained.

In conclusion, as a caveat, it must be noted that the Defendant relied to its detriment upon informality in transacting business with the Plaintiff over a period of years. Such reliance demonstrated Defendant's confidence in the good faith of the Plaintiff. Such total reliance carried with it the assumption of risk by Defendant that the Plaintiff might, at its election, avail itself of the written protections of the law, that Plaintiff might suddenly reduce informality to formality. Obviously, this case would not have reached the courts had it not been for the tremendous increase in the price of steel dictated by the unwritten law of supply and demand.

FINDINGS OF FACT

This cause having come on to be tried before the Court in vacation without a jury on April 14 and 15, 1976, and the Court having heard and considered the evidence adduced in behalf of the respective parties does hereby make the following findings of fact:

1. Plaintiff is a domestic corporation of the State of Mississippi domiciled in Rankin County, at Flowood, Mississippi, and is engaged in the business of manufacture and sale of steel reinforcing bars.

2. Defendant is a domestic corporation of the State of Mississippi domiciled in Forrest County, Mississippi, and it is engaged in the business of fabrication of steel reinforcing bars for sale to general contractors for construction work.

3. During the period July 1972 to October 1974 Plaintiff sold, furnished and delivered to defendant at its request reinforcing steel bars and materials included in which period were sale and delivery to Defendant at its request reinforcing steel bars and materials as shown in the statement of account and invoices of Plaintiff attached to the Declaration of Plaintiff as Exhibit "A" thereto in the amount of $59,668.95, said Exhibit "A" being the account between Plaintiff and Defendant on which the action of Plaintiff was brought under its Declaration.

4. Defendant failed to pay Plaintiff's account as itemized in Exhibit "A" in the amount of $59,668.95 by the due date of each of Plaintiff's invoices, each of which was on terms of net thirty days for payment thereof and said account was unpaid by Defendant despite demand for such payment made to Defendant by Plaintiff.

5. Under its Amended Answer to Counter-Claim and proof thereasto, Defendant alleged that it had entered into an oral contract with Plaintiff for the

purchase and sale of reinforcing steel bars at a price of $5.90 per hundred pounds until January 1, 1973, and at a purchase and sale price of $6.35 per hundred pounds after said date for subsequent sale by Defendant to W. R. Fairchild Construction Co., Ltd. for use in a Louisiana Department of Highways Construction job Empire, Louisiana, and that Plaintiff had overcharged Defendant in such purchase and sale of reinforcing steel bars in a net amount of $17,902.05 after credit to Defendant in the amount of the claim on which the action of Plaintiff was brought.

6. The oral agreement as so alleged by Defendant was a contract for the sale of goods for a price in excess of $500.00 and there was no writing to indicate that a contract for sale was made between the parties and signed by Plaintiff or any authorized agent in its behalf.

7. Plaintiff, in its pleadings and in response to the allegation of such oral agreement by Defendant, invoked the statute of frauds provision of the Uniform Commercial Code, Section 75-2-201(1) of the Mississippi Code of 1972, as amended, but Defendant did not establish by proof that Plaintiff ever received any writing in confirmation of such alleged contract so as to invoke any of the provisions of Section 75-2-201 (2) of (3) thereof.

8. The reinforcing steel bars sold by Plaintiff to Defendant were not specially manufactured by Plaintiff for Defendant and Defendant did not plead or prove special manufacture of the same not suitable to sale to others in the ordinary course of Plaintiff's business.

9. Plaintiff did not admit in its pleading, testimony or otherwise in Court, that a contract for sale of steel reinforcing bars was made with Defendant.

10. Defendant did not prove any exception under the Uniform Commercial Code statute of frauds.

11. There were no confirmatory memoranda between the parties under which they made any agreement with respect to sale of reinforcing steel bars or any confirmatory memoranda otherwise setting forth in a writing an intention by the parties as a final expression of any agreement between them.

12. There was no course of dealing or usage of trade between or with respect to the parties indicating that Defendant had bought from Plaintiff and Plaintiff had sold to Defendant under oral contracts steel reinforcing bars at a *fixed* and *certain* price for periods prior to July 1972.

13. Plaintiff never received any written purchase order from Defendant with regard to the purchase and sale of steel reinforcing bars in this action and thereby there was no acceptance of any offer by Plaintiff set forth in any written purchase order by virtue of the sale, delivery and shipment of reinforcing steel bars by Plaintiff to Defendant.

14. The alleged oral contract between the parties was an alleged agreement not to be performed within the space of fifteen months from the making thereof and there was no agreement in writing or any memorandum or note thereof signed by the Plaintiff as

the party to be charged therewith or by any person lawfully authorized in writing by Plaintiff.

15. Interest at eight percent (8%) per annum on the open account between Plaintiff and Defendant under its Exhibit "A" to the Declaration from and after the due date of each of the invoices of Plaintiff to-date should be added to the amount of said open account of $59,668.95.

THIS the 15th day of October, A.D., 1976.

/s/ Jack B. Weldy
CIRCUIT JUDGE

APPENDIX "C"

MINUTES, SUPREME COURT OF MISSISSIPPI

MARCH TERM, 1978

WEDNESDAY, MARCH 29, 1978

WHOLESALE MATERIALS COMPANY, INC.

versus #50,152

MAGNA CORPORATION, D/B/A
MISSISSIPPI STEEL

This cause having been submitted at a former day of this Term on the record herein from the Circuit Court

of Forrest County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 15th day of October, 1976-be and the same is hereby affirmed. Judgment affirmed is in favor of Magna Corporation d/b/a Mississippi Steel against Wholesale Materials Company, Inc. in the amount of $69,799.47 plus interest at the rate of 8% per annum from October 15, 1976 until paid together with all costs taxed in the Court below and this Court adds the sum of $3,489.97 being damages at the rate of 5% as provided for by statute. It is further ordered and adjudged that the appellant and James W. McLaughlin and The Home Indemnity Company, sureties on the appeal bond herein, do pay all of the costs of this appeal to be taxed for which let proper process issue.

APPENDIX "D"

IN THE CIRCUIT COURT OF
FORREST COUNTY, MISSISSIPPI

MAGNA CORPORATION, d/b/a
MISSISSIPPI STEEL
Plaintiff

versus Cause No. 7676

WHOLESALE MATERIALS COMPANY, INC.
Defendant

JUDGMENT

This cause having come on for trial before the Court in vacation without a jury on April 14 and 15, 1976, pursuant to stipulation of the parties, and an order of the Court heretofore entered in this cause, and Plaintiff and Defendant having appeared in open Court and having by and through their respective counsel announced ready for trial, the Court did then proceed to hear and consider evidence and oral testimony adduced in behalf of the respective parties, at the conclusion of which the Court did render its opinion, including written Findings of Fact, the same being incorporated herein and made a part hereof by reference thereto, and on the basis of which the Court does hereby adjudge that Plaintiff is entitled to Judgment against Defendant in the amount of its open account, together with legal interest thereon and that Defendant is not entitled to judgment against Plaintiff upon its counter-claim.

THEREFORE, BE IT, AND IT IS HEREBY, ORDERED AND ADJUDGED that Plaintiff have, and it is awarded, judgment against Defendant in the full sum of $59,668.95, together with legal interest thereon in the sum of $10,130.52, and in a total amount of said judgment of $69,799.47 for which and all of which let execution issue.

IT IS FURTHER ORDERED AND ADJUDGED that the counter-claim of Defendant be, and the same is hereby, dismissed with prejudice and all costs herein are taxed against Defendant, for which and all of which let execution issue.

ORDERED AND ADJUDGED this the 15th day of October, A.D., 1976.

/s/ Jack B. Weldy
CIRCUIT JUDGE

APPENDIX "E"

IN THE
SUPREME COURT OF MISSISSIPPI

WEDNESDAY APRIL 26, 1978, Court Sitting:

WHOLESALE MATERIALS COMPANY, INC.

#50,152

MAGNA CORPORATION, D/B/A
MISSISSIPPI STEEL

This cause this day came on to be heard on Petition for Rehearing filed herein and this Court having sufficiently examined and considered the same en banc and being of the opinion that the same should be denied doth order that said Petition be and the same is hereby denied.

Supreme Court, U. S.
FILED
AUG 22 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-136

WHOLESALE MATERIALS COMPANY, INC.,
Petitioner,

versus

MAGNA CORPORATION d/b/a MISSISSIPPI STEEL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION OF RESPONDENT

Bowman Stirling Tighe
925 Plaza Building
Jackson, Mississippi 39205
Counsel for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-136

WHOLESALE MATERIALS COMPANY, INC.,
Petitioner,

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MAGNA CORPORATION d/b/a MISSISSIPPI STEEL,
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THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION OF RESPONDENT

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1257 (3) and under Rule 23 (1) (f) of this Court.

QUESTIONS PRESENTED

(1) Whether the Court has jurisdiction in this case to review the final judgment of the Supreme Court of Mississippi; (2) whether the Commerce Clause of the Constitution may be invoked to decide a matter of substantive state law.

STATUTES INVOLVED

28 U.S.C. §1257. State courts; appeal; certiorari Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:***

(3) By writ of certiorari*** where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Mississippi Code of 1972, § 75-2-201

(1) Except as otherwise provided in this section, a contract for the sale of goods for the price of five hundred dollars ($500.00) or more *is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought* or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is *received* and the party *receiving it has reason to know its contents,* it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten (10) days after it is received. (Italics supplied)

STATEMENT OF THE CASE

In offering testimony by its President, Mr. McLaughlin, petitioner failed to make proof that the letter and purchase order on which it relied to take its case out of the U.C.C. Statute of Frauds were placed in the United States mail. (R 174-175; 184-186). Respondent in its pleadings had denied the existence, mailing and receipt of the documents. It was on this basis that the trial court excluded the letter and purchase order when those documents were offered in evidence. Consequently the trial court held and was affirmed by the Supreme Court of Mississippi that no presumption of the receipt of the documents was raised by reason that the proper foundation for their admissibility in evidence had not been laid. In other words, this purely evidentiary matter as applied to U.C.C. § 2-201 was the sole

matter before the trial court on which it ruled and on which it excluded the proffered evidence. At the time that the trial court made such ruling no point was made by petitioner invoking the protection of the Constitution or the Commerce Clause thereof. Likewise, when petitioner presented to the trial court its motion for judgement n.o.v. it similarly failed to invoke the Commerce Clause or the protection of any Federal Statute.

Although petitioner had further opportunity to invoke the protection of the commerce Clause of the Constitution on its appeal to the Supreme Court of Mississippi, it also failed to raise any point thereasto in the state appellate court.

REASONS FOR DENYING THE WRIT

THIS COURT HAS ACQUIRED NO JURISDICTION TO CONSIDER THE PETITION FOR WRIT OF CERTIORARI

Under 28 U.S.C. § 1257 (3) and under Rule 23 (1) (f) where a review of the judgment of the State Supreme Court is sought on petition for writ of certiorari the burden is on the petitioner to show in its petition the stage in the proceedings in the trial court and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them; and the way they were passed upon by those courts as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari. This requires that the petitioner raise the federal or constitutional question and bring it to the attention of the state court with fair precision and with a degree of particularity under the standard for framing the federal or constitutional question as ennunciated in *Oxley Stave Co. v Butler County*[1] as follows:

> "If a party intends to invoke for the protection of his rights the Constitution of the United States . . . he must so declare; and unless he does so declare 'specially,' that is, unmistakably, this court is without authority to re-examine the final judgment of the state court . . . The jurisdiction of this court to re-examine the final judgment of a state

[1] 166 U.S. 648, 655 (1897)

court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

In the case at bar the state court's consideration was of an evidentiary matter as applied under U.C.C. § 2-201 and was a matter of substantive state law with no federal or consititutional question presented thereasto and under *Beck v. Washington*[2] this court does not acquire jurisdiction to consider the petition which raises a federal or constitutional question for the first time.

Moreover, although this court will review a decision of the state court when that decision rests on state procedural law, **Henry v. Mississippi**[3], no review is proper of a state court decision resting upon state substantive law. *Murdock vs. City of Memphis*[4] Therefore, since there was no federal or constitutional question raised in the state courts, petitioner was unable to and did not make any showing in its petition that those questions were timely and properly raised and thereby this court did not acquire and has no jurisdiction to consider the petition.

THE ISSUE RAISED BY PETITIONER IS A MATTER SOLELY INVOLVING SUBSTANTIVE STATE LAW

Under *Murdock v. City of Memphis,* supra, this court should not entertain on a writ of certiorari matters involving purely substantive state law. The petitioner takes the tenuous position that the evidentiary ruling of the Circuit Court of Forrest County, Mississippi will have an adverse impact on interstate commerce and that the importance of that ruling and decision as affirmed by the Supreme Court of Mississippi is exemplified by reason that it alters or conflicts with a rule in all states of the Union having to do with the presumption of receipt which arises upon deposit in the United States mail. The basic fallacy in this argument is that petitioner failed in its proof to show that the questioned documents were deposited in the United States mail.

[2] 369 U.S. 541, 549-550 (1952)
[3] 379 U.S. 443, 446-447 (1965)
[4] 87 U.S. (20 Wall), 590 (1875)

All of the case authorities cited in the petition[5] involved situations where there was no issue as to proof of mailing and unquestionably where there is proof of mailing a presumption of receipt arises in all States as well as in the State of Mississippi. The holdings of the trial court and the Supreme Court of Mississippi in the written opinions of those courts included in the appendix to the petition affirmatively indicate that proof of mailing was not made of the questioned documents and that that was the basis on which those courts determined that there had been no receipt of the documents by respondent so as to bring petitioner within the provisions of U.C.C. § 2-201 and thereby take the case of petitioner out of the Statute of Frauds.

Even aside, however, from the fact that petitioner simply failed in its proof on purely an evidentiary matter is the overriding consideration that the determination made by both the trial court and the state appellate court under U.C.C. 2-201, was that this ruling on the admissibility of evidence by the trial court was simply an interpretation of the evidentiary requirement attendant to the U.C.C. Statute of Frauds and such is hardly calculated to shut down interstate commerce. Although the Uniform Commercial Code is adopted by forty-nine states (not by the State of Louisiana) it is nevertheless a body of state law and not of federal law and each state though adopting it has adopted it with varying alterations and provisions. Moreover, the U.C.C. Statute of Frauds is nothing more than a recodification of traditional Statutes of Frauds which are in existence in all states as state substantive law. There is no aspect of interference with commerce under any application of this substantive state law by the trial court or the state apellate court. Clearly then, *A and P Tea Co. v. Cottrell*[6] cited in the petition does not apply where there was in question a regulation directly imposing restriction on milk distributions as between the two states.

[5] *Hagner v. U.S.* 285 U.S. 427, 430 (1931); *Atherton v. Atherton,* 181 U.S. 155, 171 (1900); *Rosenthal v. Walker,* Ill U.S. 185, 193 (1884); *Grannis v. Ordean,* 234 U.S. 385, 397 (1914); *Henderson v. Carbondale Coal and Coke Co.,* 140 U.S. 25, 27 (1891); *Schutz v. Jordan,* 141 U.S. 213, 220; *Kimberly v. Arms,* 129 U.S. 512 (1889)

[6] 424 U.S. 366 (1976)

If the case at bar is at all appropriate for a constitutional analysis in terms of the cited case, it should also be analyzed in conjunction with a reading of *DiSanto v. Pennsylvania*[7] mentioned in the cited case as holding that where regulation concerns interests peculiarly local, it does not infringe the national interest in maintaining the freedom of commerce across state lines. The significance or importance of the matters raised by the petition pales when it is recognized that the petitioner cites no cases indicating a conflict of decisions with the decision by the trial court and the state appellate court. In the case at bar, that decision will not and is not calculated to affect any litigants except petitioner and respondent, as the point upon which the petition is based is solely a ruling on evidence made by the trial court.

CONCLUSION

Respondent submits that the petition itself shows conclusively that no federal or constitutional question was raised by petitioner at any stage of the state court proceedings in this case and that alone precludes a consideration by this court of the petition on jurisdictional grounds. Further the petition seeks a review solely of a matter involving substantive state law which is of no significance whatsoever in affecting interstate commerce or of contravening any rights of petitioner under the Constitution.

Respondent therefore submits that the writ should be denied.

Respectfully submitted,

Bowman Sirling Tighe
Counsel for Respondent

[7] 273 U.S. 341 (1927)

CERTIFICATE OF SERVICE

I, Bowman Stirling Tighe, attorney for respondent and a member of the bar of the Supreme Court of the United States, hereby certify that I have this day forwarded to L. Arnold Pyle, Esquire, attorney for petitioner and have thereby served him with a copy of this response by United States First Class Mail, postage prepaid, in a duly addressed envelope to his regular mailing address at Watkins, Pyle, Ludlam, Winter and Stennis, Attorneys at Law, Post Office Box 427, Jackson, Mississippi 39205,

This the 21st day of August, 1978.

BOWMAN STIRLING TIGHE